United States Court of Appeals

for the Second Circuit

APPELLANT'S PETITION FOR REHEARING EN BANC

NO. 74-2431

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NO. 74-2431

CIVIL AERONAUTICS BOARD,

Appellee,

v.

CAREFREE TRAVEL, INC., VACATION VENTURES, INC., and DORAN JACOBS;

SURREY INTERNATIONAL TRAVEL, INC., ESTHER ZETLIN and JACK GORCEY;

ERNIE PIKE ASSOCIATES, LTD., ERNIE PIKE and HENRY ZETLIN,

Appellants.

On Appeal from the United States District Court for the Eastern District of New York

APPELLANTS' PETITION FOR REHEARING IN BANC

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March 21, 1975

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2. In approving the reference of this case to a master, did this Court misapprehend the cases defining exceptional conditions justifying reference to a master under Rule 53?

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4. In finding Appellants to be "indirect air carriers", did this Court misapprehend the meaning of that term by confusing it with "ticket agent"?

PRELIMINARY STATEMENT

This is a petition for rehearing of this Court's order of March 7, 1975 affirming, on appeal, a preliminary injunction decided in the United States District Court for the Eastern District of New York by Judge Orrin G. Judd on October 15, 1974. Case No. 74C 915.

IN THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

CIVIL AERONAUTICS BOARD, Appellee, v. CAREFREE TRAVEL, INC., VACATION VENTURES, INC., and DORAN JACOBS; SURREY INTERNATIONAL TRAVEL, INC., ESTHER ZETLIN and JACK GORCEY; ERNIE PIKE ASSOCIATES, LTD., ERNIE PIKE and HENRY ZETLIN, Appellants.	Case No. 74-2431

APPELLANTS' PETITION FOR REHEARING IN BANC

Appellants hereby petition for rehearing of this Court's order of March 7, 1975, affirming a preliminary injunction issued against Appellants by District Court Judge Orrin Judd on October 15, 1974. In support of rehearing, Appellants state that:

1. In upholding the discriminatory charter flight regulations of the Civil Aeronautics Board ("CAB" or "Board"), this Court has overlooked decisions of the United States Court of Appeals for the First and Fifth Circuits as well as a 1972 decision of the CAB in the Domestic Passenger Fare Investigation, all of which are inconsistent with this Court's opinion.

2. In approving of the District Court's reference of this case to a magistrate, this Court has misapprehended the controlling Supreme Court decisions, which are consistent with -- not distinguishable from -- the facts of this case.

3. In finding that all of the charter flight rules are applicable to Appellants, this Court has overlooked the regulatory history of those rules and has misapprehended their plain meaning.

4. In finding Appellants to be illegal "indirect air carriers" rather than legal "ticket agents" this Court ignored, as did the District Court, that they are legal "ticket agents" under the Federal Aviation Act, and that controlling Board precedent would so define them.

I. IN DEFERRING TO APPELLEE'S VIEW OF THE DISCRIMINATORY CHARTER RULES, THE COURT OVERLOOKED RELEVANT COURT CASES, AS WELL AS THE MOST RECENT AND CONTROLLING BOARD PRECEDENT.

In response to Appellants' argument that the affinity charter regulations may not be enforced against Appellants because they are unjustly discriminatory and hence violative of Section 404(b) of the Federal Aviation Act of 1958, this Court noted that the Board's own interpretation of its rules is entitled to some weight (slip op. 2195).[1/] The Court also noted that it has

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1/ Significantly, the Court does not cite a Board decision supporting the validity of its affinity charter regulations in light of Section 404(b). Moreover, as will be shown below, if this Court had considered the Board's decision in the Domestic Passenger Fare Investigation, it would have reached the opposite result.

held that the regulations may be enforced in court. (Id.).[1/]

If this Court had applied the criteria enunciated in Trailways of New England v. CAB, 412 F. 2d 926 (1st Cir. 1969), and Transcontinental Bus System v. CAB, 383 F. 2d 466 (5th Cir. 1967), it would have reached a contrary result. In Trailways of New England, a reviewing court thoroughly examined the import of Section 404(b) and set out the showing to be made by a petitioner alleging that a tariff was violative thereof. A tariff was "prima facie" invalid where:

> ...on its face the tariff was restricted to a class of travelers based on social factors such as age and status, not transportation-related factors, such as cost savings. 412 F. 2d at 933.

The First Circuit then shifted the burden to the Board to overcome the prima facie case. Countering the Board's reasoning, the Court found that factors such as "time honored discrimination", "competitive need", and "promotion" would not overcome the prima facie case unless the Board's defenses were grounded on factual showings.

> In sum, we find that the Board's compilation of reasons amount to little more than generalizations

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1/ The opinion cites CAB v. Aeromatic Travel Corp., 489 F. 2d 251 (2nd Cir. 1974), for the latter proposition. Of course, that case dealt with the doctrine of primary jurisdiction and held that the Board need not institute an administrative enforcement proceeding prior to going to court to enforce the Act. It did not even touch upon the merits or the character of the affinity charter regulations sought to be enforced therein. The opinion also refers to Trailways of New England Inc. v. CAB, 412 F. 2d 926 (1st Cir. 1969), but, as will be shown, that case found the fares at issue to be violative of Section 404(b).

> of principles, unsupported by underlying facts warranting either their invocation or their applicability to the apparent discriminatory aspects of the family fare. Specificity is required....412 F. 2d at 936.

The affinity charter rules are also prima facie discriminatory, as the Board has recognized. However, the Board's justification in the case at bar also amounts to little more than "generalizations of principles". Specifically, the Board refers to, and the Court apparently adopts, the argument that abolition of affinity rules would cause a "catastrophic degree of diversion from regular fares" (slip op. 2194). As noted in Appellants' brief, the Board has never undertaken to prove this allegation; it has never come forth with any facts to support it; it has never made a study on the subject; [1/] indeed, it has an outstanding rulemaking to eliminate affinity charters because they are inherently discriminatory.

The same unsupported generalization underpins the Court's conclusion that the affinity rules are not violative of the equal protection clause of the Fifth Amendment because they have a "reasonable basis" (slip op. 2195). As this is a case of first impression, the constitutional argument calls for analysis of why the CAB's self-serving assertion of possible catastrophe provides such a "reasonable basis". [2/]

1/ The Board's ability to make such a study is attested by the fact that diversion estimates are made in every contested air route proceeding.

2/ See the reasoning of Justice Brennan in Weinberger v. Wiesenfeld, Case No. 73-1892, decided March 19, 1975.

Moreover, the record facts in this case contradict that assertion because those facts indicate that Appellants' businesses actually benefit the scheduled carriers. This Court may also take judicial notice of Pan American World Airways' assertion in National Student Travel Bureau v. CAB, No. 74-1995 (D.C. Cir.) that charter flights produced an $18 million operating profit and $31 million positive cash flow for the year ended June 30, 1974.

Trailways of New England relied upon and enlarged on Trans-continental Bus System, which held that the "promotional" aspects of a fare, by themselves, will not justify an otherwise discriminatory fare classification. 383 F. 2d at 489. Significantly, the Board's justification for the affinity charter rules is analogous to "promotional" considerations. The Board and this Court apparently both agree that it is necessary to preserve the distinction between charter service and individually ticketed service. (slip op. 2195). In effect, this argument says that the promotion of individually ticketed service is the aim of the discriminatory affinity charter rules. But this goal does not justify the rules, since discriminatory classifications may not be based on "promotional" considerations. Trailways of New England v. CAB, supra at 936; Domestic Passenger Fare Investigation, Phase 5, (Order 72-12-18, pp. 60-64, December 5, 1972).

Appellants recognize that the Board's interpretation of its own rules should be taken into account. Red Lion Broadcasting Co.

v. FCC, 395 U.S. 367, 381 (1969). Yet the Court accords no weight to the latest and most thorough Board interpretation of its own rules and the statute. In the Domestic Passenger Fare Investigation, Phase 5, (Order 72-12-18, December 5, 1972), the Board concluded that, irrespective of considerations such as "diversion" and "promotion", discriminatory fares based upon the status of traffic were unlawful.

> Thus, factors related to the status of the traffic and unrelated to transportation may not be considered in justification of a discriminatory fare, nor are we empowered to take into consideration matters involving broad social policies, such as special treatment for any particular age group, or encouragement of families as a favored social grouping, whatever our personal views may be on such policies. (Order 72-12-18, p. 63, December 5, 1972). (Emphasis supplied).

In some respects the Domestic Passenger Fare Investigation opinion even expanded on Trailways of New England and Transcontinental Bus System, since the first appears to recognize a class of fares which may be unjustly discriminatory per se. Thus, the Board has interpreted the statute to mean that classifications based upon social factors are violative of Section 404(b).

The Domestic Passenger Fare Investigation opinion came after the decision of the United States Court of Appeals for the District of Columbia Circuit in National Air Carrier Association v. CAB, 442 F. 2d 862 (D.C. Cir. 1971), which was relied upon by this Court. In NACA the finding of the Court that scheduled group affinity fares were not unjustly discriminatory was based wholly on the Board's earlier assertion that such discriminatory classification was necessary. In other words, the NACA Court relied upon

the Board's then views on what constitutes unjust discrimination. But, as has been shown, the Board changed its view in the subsequent Domestic Passenger Fare Investigation decision, and the "...contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion" is entitled to great weight.[1/] This Court leans on NACA (slip op. 2195), which in turn relies on earlier pronouncements of the CAB. However, the CAB reversed its position after NACA and its earlier opinion may no longer serve as the base of the pyramid.

II. THE COURT HAS MISAPPREHENDED THE CASES DEFINING EXCEPTIONAL CONDITIONS JUSTIFYING REFERENCE TO A MASTER UNDER RULE 53.

In approving the District Court's referral of this case to a magistrate under Rule 53 and 28 U.S.C. §636(b)(1), the Court found that "exceptional circumstances" existed and that referral was "the exception and not the rule" both as required by Rule 53 (slip op. 2182). Exceptional circumstances were found by distinguishing the facts of this case from those of LaBuy v. Howes Leather Co., 353 U.S. 249 (1957) (slip op. 2180-81). The Court further finds LaBuy to contradict the line of cases originating with Los Angeles Brush Manufacturing Corp. v. James, 272 U.S. 701 (1927) (slip op. 2177, 2179). An examination of the authorities relied upon by this Court reveals that the

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1/ Nazareno v. Attorney General, No. 74-1148, Slip op. 8-9 (D.C. Cir., March 10, 1975), quoting Power Reactor Development Co. v. International Union of Electricians, 367 U.S. 396, 408 (1961); and Norwegian Nitrogen Products Co. v. United States, 288 U.S. 294, 315 (1933).

facts herein are indistinguishable from those in LaBuy and that LaBuy logically follows in the footsteps of Los Angeles Brush.

Los Angeles Brush did not actually hold that court congestion justifies reference under the facts of that case but only that there may be some conditions under which congestion -- plus other factors -- may justify reference to a master. 272 U.S. at 708. The Court left for another day a definition of the precise circumstances under which reference would be permitted. In 1939 the Supreme Court vacated an order of reference in McCulloch v. Cosgrave, 309 U.S. 634 (1939). The citation in McCulloch to Los Angeles Brush can only mean that the facts in the former did not constitute one of the circumstances under which reference would be justified.[1/] Thus, the search for an appropriate factual setting continued.

In LaBuy, the Court surveyed the facts surrounding the reference and found them much less cogent than those held insufficient in McCulloch v. Cosgrave. The Court concluded "it appears to us a fortiori that these cases [the two actions involved in LaBuy] were improperly referred to a master." 352 U.S. at 257. Thus, the fairest reading of the principal cases is that, while the Supreme Court would allow congestion to justify reference in some circumstances, no such circumstances have as yet been presented to the Court.

1/ This appears to be the explanation given by the court in LaBuy which, contrary to this Court's statement (slip op. 2177), does indeed cite Los Angeles Brush on this point. 352 U.S. at 256-57.

In the case at bar, this Court has tried to distinguish LaBuy by showing that the facts herein were more compelling and more "exceptional". Instead, it has shown a substantial similarity -- almost an identity -- of facts:

1. Both cases began with the District Court holding hearings and considering preliminary matters prior to the reference. Thus, it is not true that the court in LaBuy referred the entire case "for trial" (slip op. 2179-80),[1] in any sense distinguishable from the case at bar.

2. In neither case was there any indication whatsoever that the court had sought to "evade" or "avoid" its responsibilities with respect to the conduct of proceedings (slip op. 2181).

3. In both cases, the congestion of the court calendar was an important factor. Compare slip op. 2180 with 352 U.S. at 249.

4. In both cases the length of time allegedly needed to try the facts was also an important factor. Compare slip op. 2180 with 352 U.S. at 254.

5. In both cases the complexity of the issues constituted allegedly unusual circumstances.[2] Compare slip op. 2180 with 352 U.S. at 254, and

6. In both cases reference was a relatively rare occurence allegedly making it the "exception and not the rule." Compare slip op. 2181

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1 / In LaBuy, the District Court judge "conducted many hearings on preliminary pleas and motions.... Several of the hearings were extended... and resulted in the filing of opinions and memoranda...." 352 U.S. at 252. The same happened in McCulloch; see 5A J. Moore, Federal Practice §53.05[1]

2 / The only complex issues in the case at bar were legal issues, the exclusive domain of the District Court.

with 352 U.S. at 258.[1/]

A final factor cited by this Court is really the only distinguishing characteristic of this case -- the public interest requiring a speedy disposition on the merits because of the millions of dollars involved and the travel plans of thousands of people (slip op. 2181). However, the Court overlooked the fact that a period of four months elapsed from the time of the filing of the complaint to the decree of the preliminary injunction. Furthermore, the magistrate here asked the District Court for an extension of time in which to file his report. Surely it cannot be argued that this case was disposed of any faster because of the reference. Indeed it is more likely that, just as in LaBuy and Adventures in Good Eating, Inc., v. Best Places To Eat, Inc., 131 F.2d 809 (7th Cir. 1942), the reference resulted in a prolongation of the litigation.[2/]

In addition, the Court has overlooked a consideration which requires a contrary result: this case was assigned to Judge Judd precisely because he himself was most familiar with the "related" case of CAB v. Aeromatic Travel. The reference thus undermined the entire rationale of the assignment. Further, the deprivation of the District Court's expertise in related cases by the order of reference was one of the reasons for disapproval of the reference in LaBuy, 352 U.S. at 256.

1/ The Court also attributes significance to the fact that the judge did not "abandon...his prerogatives" or act as a "rubber stamp" (slip op. 2180). There is no evidence that this occurred in LaBuy, either.

2/ Although there may have been pending criminal cases before the District Court on July 22 when the order of reference was made, those cases must surely have been disposed of by July 31 as the Court was leaving on vacation in August. (slip op. 2172). Therefore, the length of delay in disposing of this case, had the District Court not referred it, would probably not have exceeded nine days.

III. THE COURT HAS MISAPPREHENDED THE NATURE OF THE AFFINITY CHARTER REGULATIONS, WHICH ARE NOT APPLICABLE TO INDIRECT AIR CARRIERS.

The Court sustains District Court Judge Judd's finding that the affinity charter regulations are applicable in all respects to Appellants (slip op. 2193). The Court's reasoning appears to be that indirect air carriers should be subject to the regulations because, if they were not, indirect air carriers would be allowed to do things direct air carriers are prohibited from doing. By premising its reasoning on its own wishes, the Court has altered the reality of the regulatory scheme and has tortured logic.

Appellants have a duty under 49 U.S.C. §1485(e) to obey the affinity regulations if and only if the regulations apply to Appellants. As noted in the District Court's opinion (J.A. 61) the regulations are by their terms applicable only to direct air carriers holding certificates of public convenience and necessity. 14 C.F.R. §207.2. The Civil Aeronautics Board admitted this in the case below and at one point was prepared to dismiss Count 2 of the complaint on the ground that the regulations were inapplicable to unlicensed air carriers.[1/]

The fallacy of applying the regulations to Appellants is made clear by the regulatory history of the affinity regulations -- the history which this Court overlooked -- which shows that "intermediaries" such as Appellants were

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1/ Had the Board wished to subject indirect air carriers to the regulations, it was fully empowered to do so. Indeed, at one time "intermediaries" were so subject. Now they are not, for whatever reasons the Board in its expertise considers sound.

specifically taken out of the affinity rules by 1959.[1] As noted in Appellants' brief (pp. 22-24), the 1955 regulations required intermediaries to warrant their compliance (as well as that of others!), but by 1959 intermediaries had been consciously eliminated from the regulatory scheme by the Board itself. Instead, the "ticket agent" provisions of the Federal Aviation Act[2] were employed to prevent abuses by intermediaries.

As it stands now, the District Court and this Court have resurrected the pre-1959 rules. On rehearing, the Court should undo this act of judicial legislation and should follow the Board's rules as they have evolved in formal rulemaking proceedings.

IV. IN ANY EVENT THE COURT HAS MISAPPREHENDED THE MEANING OF THE TERM "INDIRECT AIR CARRIER" BY CONFUSING IT WITH "TICKET AGENT".

The Court finds that "the Civil Aeronautics Board quite properly argues that by selling aircraft transportation to the general public other than as an authorized agent of a direct carrier and by consumating transportation

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1 / Although Appellant Surrey is a retail travel agent and hence subject to §§207.30 and 207.31 of the affinity regulations, it is simply not true that the obligation to execute the Statement of Supporting Information makes the remainder of the affinity regulations applicable to the travel agent, as the Court holds. (slip op. 2190). The obligation to act consistently with the regulations logically encompasses only the prohibition against double compensation. If the Board had wanted to make the entire set of regulations applicable to the travel agent, it would have said so in §207.2. It begs the question to assert that the duty to act consistently with the regulations refers to anything more than the regulations specifically applicable to the retail agent.

2 / 49 U.S.C. §§1301(35) and 1381.

arrangements, the appellant corporations have acted as indirect air carriers" (slip op. 2190). At another point the Court finds that "these people were indirect air carriers in the sense that they were 'usurping' air carrier functions, and functions which were in violation of CAB regulations." (slip op. 2193). In short, the Court's novel idea is that an indirect air carrier is nothing more than a person who sells and consumates air transportation arrangements without the requisite air carrier license.

The problem with this theory is that the same facts used to construct it also demonstrate that Appellants operate as legal and authorized "ticket agents". In Appellants' motion to dismiss the complaint for failure to state a claim, [1] the difference between the two types of entities is brought into sharp focus. [2] Not every person who sells air transportation to any other person becomes an indirect air carrier. If this were an accurate interpretation of indirect air transportation, the definition of "ticket agent" in 49 U.S.C. §1301(35) would have no meaning because a ticket agent:

> ...means any person not an air carrier or a foreign air carrier and not a bona fide employee of an air carrier or a foreign air carrier, who as principal or agent, sells or offers for sale, any air transportation....(emphasis supplied). 49 U.S.C. §1301(35).

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1 / Item No. 27 in certified index on appeal.

2 / This distinction was not discussed in Appellants' brief to the Court of Appeals because Appellants were under the impression that the injunction did not restrain Appellants from being "indirect air carriers" per se.

Under this Court's decision, every ticket agent becomes ipso facto an indirect air carrier. Such an interpretation ignores the legislative history of the "ticket agent" provision of the statute, which was specifically added to bring unlawful practices of persons other than indirect air carriers within the scope of Board regulatory control.

The cases defining indirect air carrier show that it takes more than the Court found in this case to metamorphose a ticket agent into an indirect air carrier.[1/] The indispensable ingredients of indirect air transportation are that the indirect air carrier (1) purchase transportation from an air carrier for its own account;[2/] (2) hold out air transportation to the public at large;[3/] (3) sell transportation for its own account by contracting directly with the passengers in its own name;[4/] and (4) assume responsibility for the provision of the transportation.[5/]

1/ The only case litigated before the Board analyzing the distinction between indirect air carriers and ticket agents is Intra-Mar Shipping Corp. Enforcement Proceeding, 27 CAB 568 (1958).

2/ The ticket agent may also do so as a "principal" without thereby becoming an indirect air carrier. However, the record in this case shows that none of the Appellants purchased air transportation for their own account.

3/ The ticket agent by its very nature holds out air transportation to the public at large, but is not thereby converted into an indirect air carrier. This record, in any event, does not demonstrate that the Appellants held out air transportation to the public at large.

4/ A ticket agent may also do so as principal. The record evidence here shows that in no instance did Appellants contract with passengers in Appellants' own names.

5/ This activity is forbidden to ticket agents. The record evidence shows that none of the Appellants assumed responsibility for air transportation. Rather it was always made clear that the direct air carrier had that responsibility.

As is apparent, the single most important distinction between a ticket agent and an indirect air carrier is the assumption of responsibility for the provision of the transportation. 1/ The controlling precedent and the only one which clarifies the distinction between a ticket agent and an indirect air carrier is Intra-Mar Shipping Corp. Enforcement Proceeding, 27 CAB 568 (1958). There, the Board unanimously ruled that, in order to confer indirect air carrier status on Intra-Mar, that company had to have assumed responsibility for the transportation. The critical nature of this finding is pointed up by the fact that the majority and dissent merely differed as to whether the respondent had actually assumed such responsibility.

Although this Court properly holds that an administrative agency's interpretation of its own statute is entitled to great weight, it has totally ignored the holding in Intra-Mar, which remains the law under CAB precedent. Had this Court distinguished between "ticket agents" and indirect air carriers, it could not have found Appellants to be the latter on the facts of this case.

WHEREFORE, for the foregoing reasons, Appellants respectfully request rehearing in banc.

Respectfully submitted,

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1/ Air freight forwarders are the prime example of this type of indirect air carrier.

CERTIFICATE OF SERVICE

I hereby certify that I have this 21st day of March, 1975, served the foregoing petition on Appellee by causing copies thereof to be mailed postage prepaid to these persons:

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CERTIFICATE OF SERVICE

I hereby certify that I have this 21st day of March, 1975, served the foregoing substitute page 10 on Appellee by causing copies thereof to be mailed postage prepaid to these persons:

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